



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 5, 2005

Mr. Galen Gatten
Assistant City Attorney
City of Midland
P.O. Box 1152
Midland, Texas 79702-1152

OR2005-02912

Dear Mr. Gatten:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 221312.

The Midland Police Department (the "department") received a request for all reports from 2002 through 2004 that pertain to two named individuals and a specified address. You state that you have released some information, but you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Section 552.108 of the Government Code provides in pertinent part:

- a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

¹ We note that two of the submitted incident reports, which we have marked, do not involve any of the named individuals or the specified address at issue. Therefore, these reports are not responsive to the request for information, and we do not address the applicability of the Act to them. *See Econ. Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

(1) release of the information would interfere with the detection, investigation or prosecution of crime;

(2) it is information that deals with the detection, investigation or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1), (2), (b)(1), (2). Generally speaking, sections 552.108(a)(1) and (a)(2) are mutually exclusive. Section 552.108(a)(1) protects information that pertains to a pending criminal investigation or prosecution. In contrast, sections 552.108(a)(2) and (b)(2) protect information relating to a concluded criminal investigation or prosecution that did not result in a conviction or a deferred adjudication. A governmental body claiming section 552.108(a)(1) must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). On the other hand, a governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication.

In this instance, we understand you to claim that the submitted information is excepted from disclosure under sections 552.108(a)(2) and (b)(2) because it pertains to concluded investigations that did not result in convictions or deferred adjudications. However, you also represent that this information is excepted under section 552.108(a)(1) because it pertains to investigations or prosecutions that are still pending, and, therefore, release of the information would interfere with the further investigations and prosecutions of crimes. Because you have provided this office with conflicting arguments, and the documents themselves do not reflect the status of the cases, we find that you have not demonstrated the applicability of section 552.108 to the submitted information. Therefore, the department may

not withhold any of the submitted information under section 552.108 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information that is made confidential by statute. Criminal history record information ("CHRI") obtained from the National Crime Information Center (the "NCIC") or the Texas Crime Information Center is confidential under federal and state law.² Federal law governs the dissemination of CHRI obtained from the NCIC network. Federal regulations prohibit the release to the general public of CHRI maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."); *see also* Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See id.* at 10-12; *see generally* Gov't Code ch. 411 subch. F. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See* Gov't Code §§ 411.084, .085, .087, .089. Thus, CHRI generated by the federal government or another state may be disclosed only in accordance with the federal regulations. CHRI obtained from DPS or another criminal justice agency must be withheld from the public as provided by subchapter F of chapter 411 of the Government Code. We have marked CHRI that the department must withhold under section 552.101 of the Government Code in conjunction with federal law or subchapter F of chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common law privacy. Information is protected from disclosure by the common law right to privacy when (1) it is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. In addition,

² Section 411.082 of the Government Code defines criminal history record information as meaning "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." Gov't Code § 411.082(2). The definition does not encompass driving record information maintained by the Texas Department of Public Safety ("DPS") under subchapter C of chapter 521 of the Transportation Code. *See id.* § 411.082(2)(B).

this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the information that must be withheld under section 552.101 of the Government Code in conjunction with common law privacy. We note, however, that section 552.023 of the Government Code provides the requestor with a special right of access to information that would otherwise be excepted from disclosure in order to protect her privacy. *See* Gov't Code § 552.023 (person has special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interest as subject of information).

The submitted information contains social security numbers. Social security numbers and related records are excepted from disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if the social security number information was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). You claim that the submitted social security numbers fall under the federal Social Security Act because they were obtained pursuant to section 411.086 of the Government Code. That provision contemplates rules that the DPS shall adopt in regard to requests for criminal history information. Section 411.086(b)(2) states that such rules "may require a person requesting criminal history information about an individual to submit to [DPS] one or more of the following: . . . (E) any known identifying number of the individual, including social security number"

While you state that the collection of social security numbers "by police officers helps establish identities of criminals," you do not specifically state whether the department obtained or maintained the social security numbers at issue in order to request criminal history information from DPS. Moreover, you do not inform us as to whether DPS actually requires or required the department to submit the social security numbers at issue in order to request criminal history information. We find that if the department obtained or maintains the social security numbers in order to request criminal history information from DPS, and if DPS actually requires or required the department to submit the social security numbers with its request for criminal history information, then the social security numbers are confidential under section 411.086 of the Government Code in conjunction with federal law. We note that the requestor has a special right of access to her social security number under section 552.023 of the Government Code.

Lastly, we address your claim under section 552.130 of the Government Code for portions of the remaining submitted information. Section 552.130 excepts from disclosure information that "relates to. . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." We have marked the Texas motor vehicle record information that must be withheld

pursuant to section 552.130 of the Government Code. We note that the requestor has a special right of access to her driver's license number under section 552.023 of the Government Code.

In summary, the department must withhold the marked CHRI under section 552.101 of the Government Code in conjunction with federal law or subchapter F of chapter 411 of the Government Code. The marked information must be withheld under section 552.101 of the Government Code in conjunction with common law privacy. The submitted social security numbers may be confidential under federal law, but the requestor has a special right of access to her social security number. The Texas motor vehicle record information we have marked must be withheld under section 552.130 of the Government Code. The remaining submitted information must be released to the requestor.³

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

³ We note, however, that the submitted documents contain information that is confidential with respect to the general public. See Gov't Code § 552.023. Thus, in the event the department receives another request for this information from someone other than this requestor or her authorized representative, the department must ask this office for a decision whether the information is subject to public disclosure.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 221312

Enc. Submitted documents

c: Ms. Jamie Bates-Pace
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(w/o enclosures)